IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 380 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RANCHHODBHAI VANJIBHAI PATEL

Versus

RAMESHCHANDRA DAYASHANKER DAVE

Appearance:

MR BD KARIA for Petitioner

MR SATYEN B RAWAL for Respondent

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 22/07/2004

ORAL JUDGEMENT

1. At the request of learned Advocates for the parties to hear and dispose of this matter finally, the Record and Proceedings of both the courts below was

called for and received by this court. Therefore, the matter was heard finally and being disposed of accordingly.

2. This Revision Application is preferred by tenant - original defendant and appellant in Regular Civil Appeal No. 15 of 2002, against judgment and order of Joint District and Second Fast Track Judge, Surendranagar at Dhrangadhra, on 2nd of May, 2003, dismissing the said Appeal of present petitioner - appellant.

3. Present respondent - original plaintiff being landlord preferred a Regular Civil Suit No. 96 of 1995 against the present petitioner - original defendant being tenant in the Court of Civil Judge (JD), Halvad, for eviction. The suit property, as described in para -1 of the plaint in the above said suit, was let to defendant by the plaintiff at the monthly rent of Rs.600/-. The suit property is a godown. A shop was also let by plaintiff to the petitioner, for which a separate suit came to be filed, which is not the subject matter of this Revision Application. On 12.1.1994, since the tenant defendant was not paying the rent regularly of rented premises i.e. godown, a notice under Section 12 (2) of the Bombay Rent Act came to be issued against the tenant defendant by the landlord. The said notice is on record at Exh.32. Tenant replied to said notice on 1st of March, 1994, which is on record at Exh. 27, in which he took the dispute that though the rent was in arrears from 1st of August, 1993 to 31st of January, 1994, as demanded by the landlord but he had reasons for not paying the rent. He averred that in a breach of an undertaking by the landlord to the effect that the landlord shall construct the cement flooring near the shop let to the defendant, the landlord failed to do so. In addition to that, it was also stated by the tenant that southern portion of the godown (suit property) which was open plot of land and was also let to the tenant, and due to placing of waste by the people in the said open plot, it was decided between the parties that the tenant might place a door on southern wall at the expense and cost of the landlord to be adjusted in the amount of rent. According to tenant, he had placed a door, which costed him Rs.4,000/-. Thirdly in reply to the notice, the tenant also stated that the landlord was purchasing goods from his shop on credit, and that amount also was to be given in set off by the landlord in the amount of rent. Therefore, in terms, the tenant stated that in fact after adjustment, there was no arrears of rent and the landlord had no right to terminate the tenancy. Fourthly, the tenant in said reply to the notice stated that the rent

of Rs.600/was not fixed only for the godown i.e. suit property but the open land attached to the godown was also included in the demised premises, and the landlord did not facilitate the tenant to enjoy the said open land and, therefore, it was also stated that out of Rs. 600/rent which was fixed for both the properties, the rent for the open plot be deducted and be given in set off to him, failing which the tenant will be constrained to resort to the legal process for getting decide the standard rent.

4. After one and half year, and after the reply of the tenant at Exh.27, which is dated 1st of March, 1994, the landlord issued second notice on 20.9.1995, which is on record at Exh.25, and which is a suit notice. In the said Notice, Exh.25, landlord again demanded arrears of rent from 1st of August, 1993 to 31st of August, 1995 for 25 months, and also referred that though earlier notice (which is at Exh.32) was given to the tenant even though the tenant failed to act accordingly and filed false and vexatious reply. By this Notice Exh. 25 the tenancy was terminated after 15 days next to the end of the tenancy month. The said Notice Exh. 32 was also replied by the tenant on 14.10.1995 which is at Exh.28 in which he reiterated his stand taken earlier vide his reply Exh.27 and specifically stated that all the disputes which he took by earlier reply Exh.27 subsist. The suit thereafter came to be filed by the landlord on the ground of arrears on 11.12.1995 stating that the tenant was in arrears of rent for more than six months and for the possession of the suit premises on the said ground.

5. It is pertinent to note that a cheque dated 14.12.1995 of Rs.30,000/- was sent by a forwarding letter which is at Exh.35 to the landlord by tenant defendant which consisted rent of Rs.15,000/- for the shop and rent of Rs.15,000/- for the godown i.e. the suit premises, but the said cheque was refused by the landlord. It is also pertinent to note here that there was no written rent note executed between the parties but the transaction was oral. Admittedly, the cheque which was issued for the arrears of rent for the suit premises by the tenant and forwarded to the landlord was beyond the period of notice Exh. 25 dated 20.9.1995 and after the filing of the suit.

6. On filing written statement, the tenant raised the same disputes which he had raised in the reply to the notice and reiterated the stand that the rent was withheld because as per oral agreement between the parties, the landlord was to make arrangements of putting

a door in the suit godown, and that tenant was to be allowed to use the open land abutting to the godown by the landlord and therefore Rs. 600/- rent was fixed. It was also agreed, according to the tenant, by the landlord that all the expenses incurred in this respect was to be adjusted as against the amount of rent and, therefore, tenant was ready and willing to pay the amount of rent. Tenant also took the defence that the landlord was purchasing goods from the shop of the tenant on credit and that amount was also to be adjusted as against the arrears of rent. It was, therefore, urged in written statement filed that since the tenant was ready and willing to pay the arrears, he was not in default and the suit was required to be dismissed. It was also urged in the written statement that for the above said adjustments, landlord was approached by the tenant twice in company of two witnesses, out of which, one witness Shri Dadabhai was examined in the suit at Exhibit - 41.

7. To prove the case, the plaintiff examined himself at Exh.24 while the defendant examined himself at Exh. 34 and his witness Dadabhai was examined at Exh.41. Except that, as said above, two notices Exh. 32 and Exh. 25 and replies to these notices at Exh. 27 and 28, are placed on record as documentary evidence. Forwarding letter of the above referred cheque dated 14.12.1995 and cheque itself are placed at Exh. 35 and 36. Except that, no documentary evidence is on record.

8. It is not in dispute that after filing of the suit much prior to the framing of the issues, the tenant paid all the arrears and when the suit came to be decided, he had paid advance rent and throughout the Appeal also, the tenant was not in arrears.

9. From the evidence on record and after hearing the parties, learned Trial Judge came to the conclusion with reference to the issues raised that the tenant defendant was in arrears of rent for more than six months, at the time of filing of the suit. The validity and legality of the notices was also challenged, and the learned Trial Judge came to the conclusion that the notices were legal and valid. The learned Trial Judge also came to the conclusion that the defendant was not found ready and willing to pay rent and, therefore, the case was covered by the scope of Section 12(3)(a) of the Bombay Rent Act and hence the decree came to be passed for the possession as well as arrears of rent along with the interest at the rate of 6% per annum.

10. The learned Trail Judge came to the conclusion

that the legal notice which was issued by the landlord at Exh. 25 met with all the legal requirements and, therefore, it could not be said that the notice was not legal and valid. The learned Trail Judge further held that the suit property was let by the oral agreement, and if the amount which the tenant claims on account of putting a door in the wall of the godown was adjusted and given set up against the amount of arrears of rent, then also, the tenant was found in arrears for more than six months. Further, it was also held by the Trial Judge that so far as the adjustments of the amount of goods purchased by the landlord is concerned, neither the tenant could point out the exact figure of the amount due nor he could produce any evidence like accounts to prove the amount due to the tenant, and the Trial Court further held that when the adjustments claimed by defendant tenant could not be proved by him and thereafter when he was found in arrears for more than six months, the only conclusion which could be arrived at was that the tenant was not ready and willing to pay the amount of rent. While denying the argument advanced on behalf of the defendant that in the evidence, the defendant stated that the municipal taxes and education cess were the part of the rent, and that was the responsibility of the tenant to pay, the case falls within the four corners of Section 12 (3)(b) of the Bombay Rent Act, the learned Trial Judge came to the conclusion that neither tenant raised this contention in both the replies to the notice nor in the written statement and only oral say of the tenant defendant in evidence would not prove that the rent was payable annually so as to attract Section 12(3)(b) of the Bombay Rent Act. The learned Trial Judge further observed that in both the notices on record, the landlord demanded rent as was due monthly as contracted and the said fact was admitted by the tenant in reply Exh. 28. The learned Trial Judge, therefore, came to the conclusion that the case was one under the scope of Section 12(3)(a) of the Bombay Rent Act and not falling within the scope of Section 12(3)(b) of the Act. While dealing with this aspect, the learned Trail Judge came to the conclusion that since the tenant was in arrears of rent for more than six months, no dispute of standard rent was existed between the parties, tenant could not be protected under Section 12(3)(a) of the Bombay Rent Act and the decree came to be passed.

11. In Regular Civil Appeal No. 15 of 2002 preferred by the tenant - present petitioner in the Court of Joint District Judge at Dhrangadhra, besides the contention raised in suit, it was also contended by the appellant defendant that in reply to the notice Exh. 27, the

tenant had raised dispute regarding standard rent, and in reply to the second notice, contentions raised in earlier reply were confirmed again by the tenant. It was contended that even before issuing second notice, through reply of first notice, the landlord knew that tenant had raised standard rent dispute. The learned Joint District Judge dealing with the Appeal while affirming the conclusion of the Trial Judge further observed that the dispute of standard rent which was required to be taken as per Section 11 of the Bombay Rent Act, was not taken by the tenant and, therefore, there was no dispute existing between the parties about the standard rent. The Appeal, therefore, came to be dismissed vide his judgment and order impugned in this Revision Application.

12. In this Revision Application, the learned Advocate Mr. B.D. Karia for the petitioner original defendant tenant and learned Advocate Mr. Satyen B. Rawal for the landlord plaintiff - respondent were heard at length.

13. The contentions raised on behalf of the petitioner may be summarized as under :

(1) There was a dispute of standard rent existing between the parties as evident from reply Exh. 27 and when this dispute was existing between the parties, tenant was not required to pay the arrears and could be said to be ready and willing to pay the arrears of rent. It was also contended that the dispute of standard rent can be raised in reply to notice under Section 12(2) and not only by filing an application under Section 11 of the Bombay Rent Act.

(2) The decree could not have been passed under Section 12(3)(a) of the Act on account of existing dispute of standard rent raised by the tenant within the knowledge of the landlord.

(3) The tenant deposed that the rent was payable yearly and not monthly, and having taken together the cross-examination of plaintiff and the say of the defendant, the rent was containing element of annual tenancy so as to attract Section 12(3)(b) of the Act, and as per the admitted position, much before framing of the issues, the arrears was paid by the tenant and tenant continue to pay the rent in advance even till the finalization of the Appeal and, therefore, entitled to protection under Section 12(3)(b) of the Act.

(4) The judgment and decree of both the courts below were erroneous and perverse on account of improper appreciation of evidence as to the adjustment of the amount against the rent because from the first day of the hearing, the defence of the tenant was that the amount of landlord was due to the tenant and that for this reason he was not to pay the rent, and right upto the recording of the depositions, this defence was confirmed by the tenant. Secondly, it was also argued that both the courts below ought to have given finding about whether case falls within the purview of Section 12 (3)(a) or 12(3)(b) of the Bombay Rent Act, and in absence of this finding, the decree passed becomes erroneous and perverse, and matter be remanded to the court below for fresh adjudication.

14. While learned Advocate for the respondents contended that Section 12(3)(b) and Section 12(3)(a) of the Bombay Rent Act are mutually exclusive, and the present case is squarely covered by the scope of Section 12(3)(a) and does not fall within the scope of Section 12(3)(b) of the Act. According to learned Advocate for the respondent, there was no evidence at all to come to the conclusion that the rent agreed contained an element of annual tenancy. On behalf of the Respondent Mr.Rawal further contended that the dispute of standard rent must be taken clearly and unequivocal terms as to the quantum of the rent which has not been taken nor even in written statement, such dispute of standard rent has been pleaded by the defendant. It was also contended that any application under Section 11 of the Bombay Rent Act for fixing the standard rent was not filed by the tenant. It was contended that therefore there was no bona fide dispute existing between the parties about the standard rent. The tenant was undoubtedly found arrears of rent for more than six months, the rent was agreed to be paid monthly and did not contain element of any annual payment, the case was covered under Section 12(3)(a) and the decree came to be passed by the learned Trial Judge as well as confirmed by the Appellate court requires no interference. It was also contended that so far as the adjustment of amount of the rent is concerned for the goods purchased by the landlord, there was neither any evidence nor specific amount pleaded or proved by the tenant, and if the amount which the tenant spent for placing the door is given in set off to the tenant, then also, the tenant was found in arrears for more than six months as rightly pointed out by the trial court.

According to the learned Advocate for the respondent there was no error on the part of both the courts below in appreciating the evidence and come to the conclusion nor the decree passed by both the courts below could be said to be perverse.

15. Having regard to the contentions raised by learned Advocates of both the parties and having gone through the entire Record and Proceedings of the case, the contentions raised are required to be dealt with one by one. Before dealing with the contentions, it would be pertinent to note here that, according to law, though the scope of Revision under Section 29(2) of the Bombay Rent Act is wider than the scope of Revision under Section 115 of the Civil Procedure Code, even though the High Court would not upset the concurrent findings of both the courts below unless it is found that the findings are erroneous and so perverse, that it would perpetuate injustice if allowed to stand. The scope of interference therefore though is wider but restricted to the extent that findings of the facts cannot lightly be interfered with in Revision under Section 29(2) of the Bombay Rent Act. The Duty of the court is to satisfy itself in such Revision to scrutinise carefully whether the findings arrived at by both the courts below are according to law.

16. Dealing with the contentions raised on behalf of the petitioner, the first and foremost is, whether there was a dispute regarding standard rent existing between the parties so as to avoid the operation of Section 12(3)(a) of the Bombay Rent Act. My attention was drawn to the reply to the notice at Exh.27 wherein denying the first notice of the landlord, tenant took up the defence that the rent of Rs. 600/- was agreed for not only of the godown premises but open land abutting to godown was included in it. The landlord did not allow to utilize the open land to the tenant. In this respect, the tenant conveyed to the landlord in said reply Exh.27 that since the open land was not allowed to utilize by the landlord to the tenant, rent in this aspect was required to be adjusted and on failing which, the tenant would initiate proceedings for fixing of the standard rent. Learned Counsel for the petitioner stated that thus the dispute right from the initiation of the notice stage, was very well existed between the parties. In support, learned counsel for the petitioner has relied upon certain decisions. He relied upon a decision of the Full Bench of this Court in the mater of RAMNIKLAL DWARKADAS MODI vs. MOHANLAL LAXMICHAND & ORS., as reported in 1977 GLR 32, wherein while setting modes of raising dispute of standard rent, this Court ruled that the tenant can also

claim protection from the operation of Section 12(3)(a) of the Act by raising a dispute as to the standard rent either in reply to the notice under Section 12(2) of the Bombay Rent Act or even prior to the said notice, but when the dispute is raised in reply of notice, then it should be within one month from the receipt of such notice by the tenant. It was, therefore, contended that within one month, Exh. 27 was given to the landlord, which is a reply to his notice, wherein as above said, dispute as to standard rent was raised. Learned Counsel for the petitioner has also relied on a decisions of this Court in the matter of KASAM UMAR vs. FAKIR AMNABAI ABU, reported in 1998 (1) GLR 431 and (DECD.) and in the matter of MOHANLAL JERAM MISTRY vs. H.M. MANIYAR, as reported in 1993 (1) GLH 770 to fortify his contention as to how the dispute of standard rent can be raised by the tenant. In the case of Kasam Umar (supra) the Court ruled that the expression raising of standard rent dispute, means any dispute from which it can be inferred that the tenant disputes his liability to pay rent at the rate claimed by the landlord while in the case of Mohanlal Jeram Mistry (supra) it was decided by the court that the dispute of standard rent can be raised by a necessary implication also and tenant may not expressly raise such dispute. In this respect, learned Counsel for the petitioner has also relied upon a decision in the matter of BAI MOHINIBHAI DHARMASEY vs. KHIMJI TOKARSHI JIVRAJ, as reported in AIR 1976 Bom. 295 and a decision of this Court in the matter of UDYOMAL NATHUMAL AND ANR. vs. PREMCHAND TRIKAMDAS BASWANI, as reported in 1980 21 GLR 869 to substantiate his contention that mere omission to pay rent would not lead to the conclusion that tenant has neglected to pay the rent. It was emphasized that according to the above two decisions, there should be some positive mental attitude of the tenant for not paying rent. It was contended that on the contrary, in this case, right from the beginning, the tenant has come with a clean defence that the landlord had agreed with him that the expenses for placing a door in the suit godown and the amount of the goods purchased by the landlord were to be given set off by the landlord to the tenant and, therefore, in this case the tenant cannot be said to be neglected in making payment of rent within the meaning of Section 12 (1) of the Bombay Rent Act, natural consequence of the same would be, the tenant, when he is found ready and willing to pay the rent, Section 12(3)(a) of the Bombay Rent Act would not operate against him.

17. Evaluating above contentions of learned Counsel for the petitioner, it can be said that, true it is that, once the dispute is raised by the tenant as to the

standard rent, by one of the modes as prescribed by the decision of this Court in the matter of _Ramniklal vs. Mohanlal Laximichand (supra), he gets protection under Section 12(3)a) of the Bombay Rent Act. One of the mode, undoubtedly, raising a dispute of standard rent, is conveying to the landlord within one month of the service of notice under Section 12(2) of the Bombay Rent Act that the tenant has dispute as to the standard rent. True it is also that, such dispute can be inferred from the circumstances, and tenant may not have taken that dispute expressly. Then the question arises what should constitute raising a dispute of standard rent. Though it is not necessary for tenant to use explicit expressions in this respect, but the circumstances must be such as it could easily be inferred that the tenant has dispute as to the standard rent. In the matter of Kasam Umar (supra), in written statement, defendant pleaded that the landlord was not entitled to bring the suit for possession because there was an oral understanding between the landlord and tenant that the plaintiff should charge rent at the rate of Rs.15/- p.m. from 18th of April, 1973 and, therefore, the rent charged at the rate of Rs.20/- p.m. was excessive and not standard rent. This pleading was considered to be constituting the dispute of standard rent. While in the matter of Mohanlal Jeram Mistry (supra) in the reply to a notice the tenant has in terms made grievance about excessiveness of the rent of the rented premises and stated that the rent of the rented premises formerly was Rs. 4/- per month and it had been raised to Rs.6.25 per month. This contention of the tenant was considered to be constituting the dispute of standard rent. While coming to the facts of this case, firstly, the phraseology used in the reply to the notice, which is at Exh. 27, it, by no stretch of reasoning, can be inferred that the tenant had raised a dispute of standard rent. The tenant only conveyed to the landlord that the rent which was fixed for the premises which was actually let and when some portion of the demised premises was not allowed to use, the landlord should adjust the amount of rent in this respect. It was only thereafter conveyed by the tenant to the landlord that if the landlord fails to act accordingly, the tenant would be constrained to file the legal proceedings for adjudication of the standard rent. This averments made in the notice firstly cannot be said to be constituting a dispute of standard rent, more so when, this issue was not pursued by the tenant any further. It is an established law that even if the dispute of standard rent is raised by the tenant, and if the same is found not bona fide on legal scrutiny, then it turns into no dispute at all. While in this case,

except this averments made in Exh.27 and as confirmed by second reply, neither tenant pleaded this issue in reply of the suit nor any step was taken by him to adjudicate or even raise the dispute at the subsequent stage of the suit and, therefore, in absence of pleadings in this respect, in absence of issues or evidence led, it could not be said that the tenant legitimately raised the dispute of standard rent vide Exh.27 and, therefore, he was entitled to protection under Section 12(3)(a) of the Bombay Rent Act. The contention has to be negatived that both the courts below committed errors in coming to the conclusion that there was no dispute between the parties as to the standard rent, and since the tenant was found in arrears for more than six months, there was no other alternative for the court except to pass a decree for eviction under Section 12(3)(a) of the Bombay Rent Act.

18. Dealing with the second contention about applicability of Section 12(3)(a) of the Bombay Rent Act, it is clear that though the tenancy was created orally but on evidence recorded by the Trail Court, it came to the conclusion that the tenant failed to prove firstly that godown as well as the open land was let to the tenant - defendant while the plaintiff was able to prove that only godown was let to the defendant at the rate of Rs. 600/- per month. The plea of adjustment which was raised by the tenant by way of defence was rightly negatived by the Trial Court. As contended, it is true that, tenant right from the beginning since the reply of the first notice, took his stand that the landlord agreed to give him set off some amount towards the rent amount which was due to the tenant by the landlord on account of expenses incurred by the tenant in the said godown as well as on account of purchasing the goods by the landlord from the shop of the tenant. The contention can be given credence only if it is proved during the trial of the suit and not because the tenant raised such contentions right from the beginning. Undoubtedly, when a claim is based on the goods purchased, then in terms, it is the claim based on accounts. Unless this claim is proved through the accounts kept in ordinary course of business, such claim could not be said to have been proved. In this case, the tenant failed not only to substantiate his claim through the books of accounts kept in ordinary course of business but failed to plead and claim definite amount due to him of the landlord, and in these circumstances, the Trial Court came to the conclusion that if it was assumed that the tenant incurred some expenses on account of putting a door in suit godown, and even after adjusting of amount which tenant put forward on this account, the tenant was found

in arrears of rent for more than six months and, therefore, the case which was falling under Section 12(3)(a) of the Bombay Rent Act wherein tenant was not found ready and willing to pay the arrears. This conclusion of the Trial Court as well as the Appellate Court could not be said to be erroneous or perverse, for the above said reasons, as to call for interference in this Revision Application. The contention, therefore, has to be negatived that the tenant was ready and willing to pay the arrears and since the tenant has stated the reasons for not paying the amount of rent, and that there was no neglect on the part of the tenant, decree of eviction could not have been passed. When the defence for not paying the arrears of rent by the tenant is grounded, it could be said that, non-payment of arrears in this case is not mere omission or a case in which tenant had reasons not to remit arrears, but this is a case where within the meaning of Section 12 of the Bombay Rent Act, there is negligence on the part of the tenant to pay up the arrears as demanded by the landlord.

19. So far as the third and fourth contention raised on behalf of the petitioner is concerned, it was vehemently urged that alternatively, the case falls within the purview of Section 12(3)(b) of the Bombay Rent Act. My attention was drawn to the decision of this Court in the matter of MOHAMMEDBHAI S. SHEIKH vs. VRAJLAL MATHURDAS, reported in 2002 (2) GLH 274, wherein after relying on a decision of the Supreme Court in the matter of RAJU KAKARA SHETTY vs. RAMESH PARATAPRAO SHIROLE, reported in (1991) 1 SCC 570, this Court ruled that merely because rent includes element of tax, does not mean that the rent is not payable by month. Rent is said to be payable yearly only if annual payment i.e. tax is quantified on monthly basis. Relying on this observation and observation as to Section 20 of the Bombay Rent Act, 1947, my attention was drawn to a deposition of the defendant wherein in his deposition, defendant has stated that according to oral agreement, beside the rent, property tax and education cess was to be paid by him. My attention was also drawn to the cross-examination of the plaintiff wherein the plaintiff admitted that he had taken deposit of Rs. 5,000/- from the tenant, but he denied that the tenant was saddled with the liability to pay the property tax as well as education cess and the said amount was to be given in set off from the amount of deposit. Relying from this extract of the evidence, it was further argued that the rent was payable therefore though monthly, but the annual taxes was the responsibility of the tenant and, hence, the case never fell within the purview of Section

12(3)(a) but within the scope of Section 12(3)(b) of the Bombay Rent Act. It was contended that admitted position is, the tenant paid all the arrears in the court much before the framing of the issues and that is evident vide Exh. 37 which is a statement of deposit of rent. Not only that, but the tenant paid thereafter the rent in advance and was never in arrears till the finalization of the proceedings at the appellate stage and today as well. Therefore, since the tenant had paid the rent on the first day of the hearing and thereafter paid the rent continuously and since the annual taxes responsibility was saddled on tenant, under Section 12(3)(b), the tenant was protected and the eviction decree passed against the tenant is not only erroneous but perverse as well. To evaluate the contention, it is necessary to go to the notices issued by the landlord and replied by the tenant. In his notice itself when monthly tenancy was contended by the landlord, the same was admitted by the tenant in his reply at Exh. 27. Not only that, but thereafter at any stage till the cross-examination of the plaintiff by way of pleading or otherwise, tenant nowhere contended that the rent was not monthly but either inclusive of municipal and education cess or beside the monthly rent the tenant was liable to pay any such annual taxes. Merely stating in deposition to bring the case within the purview of Section 12(3)(b) and to take out of Section 12(3)(a) of the Bombay Rent Act, it was so stated by tenant in deposition, without pleading that it was the responsibility of the tenant to pay annual taxes beside the rent fixed monthly. This fact would not establish annual tenancy so as to attract Section 12(3)(b) of the Bombay Rent Act. On the contrary, from the facts of the case, both the courts below rightly came to the conclusion that firstly tenant accepted the say of the landlord that it was monthly tenancy and that the tenant failed to plead and prove this aspect so as to form a definite conclusion. In above said decision of this Court in MOHAMMEDBHAI S. SHEIKH vs. VRAJLAL MATHURDAS (supra), the principle laid down by the Supreme Court was reiterated that even if the rent includes the element of municipal tax does not mean that rent is not payable by the month. If the rent is fixed rent per month, the element of tax within such fixed rent makes no different and such fixed rent remains rent payable by the month. Meaning thereby that it is only when beside the rent, tenant is liable to pay taxes and if part of the amount of rent is quantified to be paid as annual taxes, rent could be said to be paid not monthly but by yearly. Therefore, the contention has to be negatived that the case falls within the scope of Section 12(3)(b) and tenant is protected on account of his paying arrears

before the first date of the hearing and thereafter payment made towards rent continuously in advance.

20. The contention that the decree passed becomes perverse because the court failed to record the findings whether Section 12(3)(a) or Section 12 (3)(b) applies, must not find favour because from bare reading of the judgment of the trial court, it becomes clear that such contention was raised on behalf of the tenant, and after careful consideration and by sound reasoning, the trial court came to the conclusion that the case was covered by Section 12(3)(a) of the Bombay Rent Act. In this respect, the trial court discussed all the four conditions envisaged by Section 12(3)(a) of the Bombay Rent Act with reference to the evidence recorded, negativing the contention that the case was covered by Section 12(3)(b) of the Bombay Rent Act, the trial court found that the landlord was entitled to the eviction decree. Neither the decree passed by the trial court nor the judgment and order of the appellate court confirming such decree requires any interference in this Revision Application except observation of the Appellate Court that the dispute of standard rent can be raised only by filing an application under Section-11 of the Bombay Rent Act and the decree passed by the Trial Court for the recovery of arrears of rent with interest at the rate of 6 per cent per annum and as confirmed by the Trail Court. It is now established law as settled by the decision of the Full Bench of this Court in the matter of Ramniklal Dwarkadas Modi vs. Mohanlal Laxmichand & Ors (supra) that the dispute of standard rent can also be raised even before issuance of notice under Section 12(2) or within 30 days from the service of such notice and beside filing of an application under Section-11, the dispute can be raised through reply to notice issued under Section 12(2) of the Bombay Rent Act. So, those observations of the Appellate Court will have to be set aside to the effect that the dispute of standard rent can only be raised by filing an application under Section-11 of the Bombay Rent Act. So far as the merits of the case is concerned, setting aside these observations, would not affect the ultimate conclusion arrived at by the Appellate Court. Like wise, the award of interest by the trial court on the arrears of rent at 6% per annum is also set aside as confirmed by the Appellate Court. The awarding of the interest, undoubtedly, rests in the realm of the discretion of the court, but there the court is required to take into consideration compensatory aspect, and in this case, this aspect is absent. On the contrary, the tenant has paid the rent in advance and the question of awarding of interest would not arise at all.

21. Except on the above said two aspects, there is no justification in interference of the conclusion arrived at by both the courts below and, therefore, the following order is passed.

" This Revision Application is partly allowed to the extent of above said two aspects and except that in all other respect the Revision Application stands dismissed. Rule is made absolute to the above said extent only. The interim relief granted by this Court in favour of the revisionist vide order dated 1st of March, 2004 and extended from time to time and was extended till further orders on 7th of July, 2004 is further extended for 8 weeks."

(J.R. Vora, J.)

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